No. 15,619

In the

United States Court of Appeals

For the Ninth Circuit

John Hancock Mutual Life Insurance Company, a corporation,
Appellant,

vs.

Mary Troutfelt Cohen,
Appellee,

and

Mary Troutfelt Cohen,
Appellant,

vs.

John Hancock Mutual Life Insurance Company, a corporation,
Appellee.

Brief of Plaintiff in Support of Cross-Appeal

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Brief of Plaintiff in Support of Cross-Appeal

This action was a suit on a contract of life insurance by the insured's widow and beneficiary against the insurer (F. 3, 4; R. 101)* From a judgment in her favor (R. 107) the defendant has appealed. (R. 109) The plaintiff has cross-appealed from the failure of the District Court to include in the judgment in her favor any sum on account of a breach by defendant of its written warranty that

*The notation "F....." refers to the District Court's findings.

> "It is not necessary to employ any firm or person to collect the proceeds of this policy." (Ex. 1; R. 113)

This brief is confined to the cross-appeal and presupposes that defendant's appeal will be unsuccessful. The lack of merit of that appeal will be discussed in the brief to be filed by plaintiff in due course as appellee.

JURISDICTIONAL STATEMENT

The action was begun in the Superior Court of the State of California in and for the City and County of San Francisco (R. 8) and was removed by the defendant to the court below (R. 6) pursuant to 28 U.S.C. § 1441. The District Court had jurisdiction under 28 U.S.C. § 1332(a)(1) (F. 1, 2; R. 100, 101), and this Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

In 1939 Martin E. Troutfelt—like a million other Americans—took out insurance with defendant for the protection of his wife in the event of his death (F. 4, R. 101). In addition to the $5,000 face amount of the policy (R. 31), the contract, by the "Supplementary Provision for Family Income" (R. 36), provided in plain English that the defendant insurer would pay his widow $50 a month from his death until the lapse of 20 years after the policy's effective date, i.e., until February 1959 (F. 5; R. 101).

Secure in the belief that his wife was provided for, Troutfelt—like a million other Americans—accepted the policy delivered to him and dutifully paid all the premiums called for by the contract (F. 6; R. 102), until he died on June 28, 1945 (F. 13; R. 104).

Thereupon, his widow, the plaintiff, transmitted the original policy (Ex. 1; R. 124) to defendant as part of the proof of death and claim for payment, and as part of its processing of the claim defendant executed on the contract the assurance (F. 10; R. 103):

> "Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income dated February 24, 1939 attached hereto."

So endorsed, the policy was returned to plaintiff (F. 10; R. 104).

Defendant made the monthly payments through February 1, 1954 (F. 13; R. 104). Then, although there were still 5 years to go, and *9* years after making the ratification and promise just quoted, *9* years after the husband's mouth was closed by death, and *15* years after the policy was issued, defendant notified plaintiff that it would make no more monthly payments and offered the $5000 face amount as full discharge of its obligations (F. 13, 14; R. 104).

Defendant's excuse for this outrageous conduct was that the Supplementary Provision, written by itself, did not mean what it said. Although it plainly provided for monthly payments until the lapse of 20 years, it should have said 15 years, and there was, forsooth, a "mistake"! Indeed, defendant brazenly stated that it *never* considered its policy to represent its contract (R. 57, 144).

To collect the additional $3000 due her (5 years of monthly payments of $50 each) plaintiff was thus precipitated into a lawsuit, compelled to sue, to defend against a counterclaim, and then, after a judgment in her favor rejecting defendant's preposterous position, to defend an appeal. In short, it was "necessary to employ a firm or person to collect the proceeds of the policy", to wit, attorneys. For that reason plaintiff incorporated in her complaint (R. 83) a claim for breach of the warranty that

> "It is not necessary to employ any firm or person to collect the proceeds of this policy."

The trial court gave plaintiff judgment for $8,000, being the $5000 face amount plus the $3000. But it denied plaintiff *any* sum as damages for breach of the warranty just quoted.

STATEMENT OF THE QUESTIONS INVOLVED

When a contract of life insurance provides that

> "It is not necessary to employ any firm or person to collect the proceeds of this policy"

and the insurer's wrongful refusal to pay these proceeds compels the beneficiary to employ counsel to sue therefor, is not the beneficiary, upon recovering judgment for the proceeds, entitled to damages for breach of warranty, and is not a reasonable attorney's fee a measure of the damages?

SPECIFICATION OF ERROR

The trial court erred in failing to award plaintiff any damages on account of the breach, by defendant, of its written warranty that

> "It is not necessary to employ any firm or person to collect the proceeds of this policy."

ARGUMENT

The provision that

> "It is not necessary to employ any firm or person to collect the proceeds of this policy"

is a warranty. Thus in *Guardian Life Insurance Co. of America v. Brackett,* 108 Ind. App. 442, 27 N.E. 2d 103 the insurance contract contained a similar provision:

> "To collect the amount payable under this policy it is not necessary to employ any person, firm or corporation."

The court said of this clause (27 NE 2d at 109):

> "This endorsement was, no doubt, for the purpose of assuring the policyholder his interests would be cared for by the insurer, and that *he need not expend money for counsel relative thereto. The policy holder had a right to rely upon the endorsement,* and no doubt, did so rely thereon when he purchased the policy * * *"

It is, of course, precisely because the defendant wishes its policyholders to rely on this provision that it places it in a prominent place on the contract.*

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*The policy folds into a document about 4 x 9 inches. The warranty is so placed that it is seen immediately in the first stage of unfolding.

To treat the clause as other than a warranty would be to make it mere sales puff, something inconceivable in a life insurance contract, for it would then be a snare and deceit for those seeking protection for the people they leave behind. As said in *Bollinger v. National Fire Ins. Co.,* 25 Cal. 2d 399, 405, 154 P.2d 399, 403:

> "it must not be forgotten that the primary function of insurance is to insure."

The purpose of clauses in a contract of insurance is to protect the beneficiary, not to delude the assured.

The provision in question was a warranty, and it has been breached in this case, for the beneficiary has been compelled to employ attorneys to press her claim to proceeds wrongfully denied. The damages flowing from this breach are at least the costs and expenses of the litigation and, more particularly, the expense of employing a "firm or person to collect the proceeds of the policy", to use the very language of the policy itself.

To hold otherwise would make it possible for a large insurance company, with its vast resources, callously to oppress a needy beneficiary. The amount involved is small. The insurer in effect says to the beneficiary:

> "Take what we offer or go to court. There you have nothing to gain but trouble and worry, for if you prevail and recover, after we have carried you as far on appeal as we can, you will have incurred attorneys' fees that will eat up the whole recovery; or else you must employ attorneys of lesser competence or lesser experience to confront our able counsel, in order to be able to pay only a small fee."

What a Hobson's choice for the beneficiary! As said in a somewhat similar situation, *Arenson v. National Automobile & Casualty Ins. Co.,* 48 A.C. 531, 542, 310 P.2d 961, 968:

> "Sustaining such a theory would not only tend to discourage busy attorneys from rendering adequate services for needy clients but would tend also to encourage insurance companies to similar disavowals of responsibility with everything to gain and nothing to lose."

Reason for District Court's denial of damages.

The District Court disallowed plaintiff's claim involved in this cross-appeal on the theory that plaintiff sought to recover "an award of attorney's fees" and that "an award of attorney's fees must be authorized by statute or by an agreement of the parties". (R. 81) We have no quarrel with this statement of the law. But it misconceives the issue. Plaintiff does *not* seek "an award of attorney's fees" *as such,* but damages for breach of a warranty. That those damages happen, in this case, to be measured by what would be a reasonable attorney's fee cannot defeat the right.

Suppose the clause in the policy had read,

> "Insurer warrants that it will not be necessary for beneficiary to employ any firm or person to collect the proceeds of this policy."

The language actually used means the same thing, but the supposition clarifies the issue. That warranty would have created an obligation for breach of which the insurer would have to pay any damages proximately caused. That obligation would be separate from and *additional* to the obligation to pay the insurance proceeds, for the insurance would be payable even though the additional warranty were not present. The warranty in this case adds a separate obligation, and the damages caused by its breach are the expense of employing a person or firm to collect the proceeds.

The trial court's opinion observes that (R. 81):

> "In the opinion of this Court the quoted language is not sufficiently definite. If the clause in question was meant to apply to attorney's fees, the phrase 'attorney's fees' could easily have been used."

It has been endlessly reiterated (e.g., in *Continental Casualty Co. v. Phoenix Construction Co.,* 46 Cal. 2d 423, 437, 296 P.2d 801, 809):

> "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against

> the insurer. [Citations omitted.] If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citation omitted.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [Citations omitted.] the amount of liability [Citations omitted] or the person or persons protected [Citations omitted] the language will be understood in its more inclusive sense, for the benefit of the insured."

The reason that the precise phrase, "attorney's fees", is not used is that the obligation is *broader* than to pay attorney's fees. It relates to any person or firm, and the more inclusive necessarily includes the lesser. An insured under a policy containing this language might engage a non-lawyer—an insurance expert—to collect by persuasion, or a broker to collect by promise of future favors. In that event the damage would be the expense of engaging him, i.e., an "expert's fee". It happens that the persons necessarily employed in the instant case were attorneys, and the expense may therefore loosely be called an "attorney's fee". But the name should not deprive the insured of the right to damages flowing from the breach of the warranty.

There are many situations in which "attorney's fees" have been awarded, *not as such,* but as the damages for breach of an obligation which fails to mention attorney's fees in terms.

Thus, insurance companies regularly agree to defend their assureds against claims. When the insurer violates its obligation to defend, the insured is entitled to retain counsel and recover the expense thereof from the insurer *not* because the policy provides for the payment of "attorney's fees" but because the *measure of damages* for breach of such an undertaking includes the expense of counsel. As said in *Arenson v. Nat. Auto. & Cas. Ins.*

Co., 48 A.C. 531, 542, 310 P.2d 961, 968, in awarding an assured a judgment to cover his obligation to his attorney:

> "Here, the company agreed to defend any suit brought against Arenson * * * Having defaulted such agreement the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him."

Again, by statute (Probate Code § 680), the estate of a father is obligated to pay to a child "a reasonable allowance * * * for maintenance". Although the statute says nothing about attorney's fees, in *Estate of Filtzer,* 33 Cal. 2d 776, 781, 205 P.2d 377, 380, the Court affirmed an allowance including compensation for petitioner's attorney, saying:

> "While appellant cites no authority holding that attorney fees are not allowable in a proceeding such as this, he relies on the general rule that 'attorney's fees' are not recoverable unless 'specifically provided for by statute * * * [or] agreement * * * of the parties' [citing authorities]. * * * "However, such authorities have no relevancy here, for the trial court did not deem 'petitioner * * * entitled to *attorneys fees as attorneys fees'* but correlated such added relief with the concept of an obligation assumed by her on behalf of the child 'to defend his rights' to share in the decedent's estate."

Another example may be found in warranty deeds. The deed nowhere mentions attorney's fees, but in it the grantor warrants seizin, quiet enjoyment, to defend the title, etc. If the grantor fails to defend against a hostile claim, the grantee may protect his rights, either as plaintiff or defendant, and recover from his grantor, as damages for breach of warranty, compensation necessarily paid his attorney. *McCormick v. Marcy,* 165 Cal. 386, 132 Pac. 449; 2 Sutherland, Damages (4th ed.) § 617, p. 2135 et seq. The same rule applies to the implied covenant of quiet enjoyment in a lease. *Levitzky v. Canning,* 33 Cal. 299, 308; *Standard Livestock Co. v. Pentz,* 204 Cal. 618, 632, 269 Pac. 645, 650. Similarly,

when a contractor promises to build a structure, and a bonding company agrees to indemnify the owner for loss caused by the contractor's breach, the owner may recover damages against both the contractor and the surety *measured* by counsel fees incurred by the owner in defending actions brought by lien claimants. *Bird v. American Surety Co.,* 175 Cal. 625, 631, 166 Pac. 1009, 1012.

A contract must be so construed as to give effect to every part. Cal. Civ. Code, Sec. 1641; 3 Williston on Contracts, § 618, p. 1779. Every word and phrase should be given meaning. *Basler v. Warren,* 159 F.2d 41, 43 (10 Cir.).

If the clause in question on this cross-appeal does not entitle plaintiff to damages for its breach, measured by the expense of engaging someone to collect the proceeds of the policy, then the clause has no effect and has become idle verbiage. The consequences would be that, although the insured prevails in a suit forced on her by the insurer's wrongful refusal to pay, she nevertheless loses, because a substantial portion or all of the insurance will be consumed in necessary expense. *If* there were no provision in the policy, this unfortunate and unjust consequence might have to be borne. But the policy *does* contain the warranty, and we respectfully submit that effect should be given to it.

CONCLUSION

The complaint prayed for $1500 as the reasonable amount of attorney fees for services in the trial court. Having been forced to defend the appeal, plaintiff is entitled to an additional amount, and we submit that an additional $1500 would be reasonable. Since the value of attorney's services in a court is a matter within the knowledge of the court, from judicial experience the court can fix the amount without extrinsic evidence. *Standard Oil & Gas Co. v. Guertzgen,* 100 F.2d 299, 302 (9 Cir.); *Warner v. Warner,* 34 Cal. 2d 838, 843, 215 P.2d 20, 23. Three courses are possible:

1. This Court can fix the amount of the fee for services on the appeal and remand the cause to the District Court with directions

to fix the amount of fees for services rendered in that court and to add both sums to the judgment.

2. It can itself fix the entire amount of fees for services in both courts and modify the judgment to add that sum to the recovery.

3. Or it can remand the cause to the District Court with directions to determine the amount of fees for services in both courts and to add that sum to the judgment.

We respectfully submit that one of these three courses should be followed.

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